

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division**

D.P. TECHNOLOGY CORP.,
a California corporation,
Plaintiff,
v.

ESPRIT IP LIMITED,
a British Islands corporation,
Defendant.

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FILED: APRIL 2, 2008
Case No. 08CV1902 AEE
JUDGE CASTILLO
Judge MAGISTRATE JUDGE SCHENKIER

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES D.P. Technology Corp. (“plaintiff”) and, as a complaint against Esprit IP Limited (“defendant”), hereby states as follows:

Parties

1. Plaintiff, which has its principal place of business at 1150 Avenida Acaso, Camarillo, California, was incorporated in 1982 under the laws California and is in good standing, and has long conducted its worldwide business involving computer-aided design and manufacturing (CAD/CAM) software systems for a full range of machine tool applications under its ESPRIT and ESPRIT & Design trademarks.

2. On information and belief, defendant, which has a business address of Offshore Incorporations Center, P.O. Box 957, Road Town, Tortola, British Virgin Islands, is a British Virgin Islands corporation.

Jurisdiction and Venue

3. This action arises under the Trademark Laws of the United States (15 USC §1051 *et seq.*), jurisdiction being conferred on this Court pursuant to 28 USC §1331 and §1338(a). This is a declaratory judgment action under 28 USC §2201 and §2202.

4. Venue is proper in this judicial district pursuant to: 28 USC §1391(b) and (c) because defendant does business in this district and has sufficient contacts in this district to be subject to personal jurisdiction; and 28 USC §1391(d) because, on information and belief, defendant is an alien.

Background

5. Plaintiff has long been and currently is engaged in the development, manufacture, sale, and service of its proprietary computer-aided design and manufacturing software systems used for a wide variety of machine-tool applications, and in related customer training, all of such goods and services being referred to herein as plaintiff's "CAD/CAM-related goods/services." Plaintiff conducts business throughout the United States, including the State of Illinois, and elsewhere.

6. Plaintiff has used its ESPRIT trademark in connection with its CAD/CAM-related goods/services continuously since at least 1984, and such use has included use of its ESPRIT & Design trademark since at least January 2000.

7. Plaintiff promotes and sells its CAD/CAM-related goods/services in the highly-specialized niche market of software systems for control of manufacturing operations. On information and belief, defendant does not sell software and certainly does not offer goods and services to the niche market of software systems for control of manufacturing operations. Nor does plaintiff offer and sell goods or services in markets served by defendant.

8. All of plaintiff's customers and potential customers are sophisticated persons who make careful purchasing decisions, all of which involve substantial investments.

9. In contrast, defendant's business under its "Esprit" mark involves products and services remote from CAD/CAM-related goods/services, involving instead things like items for personal use and home decor.

10. Defendant's customers and potential customers consist of the general public who make purchasing decisions on everyday items.

11. In addition to plaintiff's ESPRIT marks and defendant's "Esprit" marks, many other companies long ago adopted and have continued to use various Esprit trademarks in the United States in connection with a wide variety of products and services. Upon information and belief, these have included at least the following:

- "Esprit" for glass fiber ceiling panels (Owens-Corning/AWI Licensing Co.);
- "Esprit" for prostheses, artificial limbs and joints and artificial skin covering (Chas. A. Blatchford & Sons Limited);
- "Esprit" for woodwind instruments such as clarinets (Conn-Selmer Inc.) ;
- "Esprit" for medical ventilators (Respironics Georgia, Inc.);
- "Esprit" for control panels for electronic security alarm systems (Paradox Security Ltd.);
- "Esprit" for mounts for video surveillance cameras (Pelco Sales, Inc.);
- "Esprit Realty" for real estate brokerage (Adrian McMillian);
- "Esprit Miami" for fresh cut flowers (Christine Martindale);
- "Esprit HR" for textile goods for surgical, medical and veterinary products (British Millerrain Co. Ltd.);
- "Esprit de Paris" for mustard (Schreiber Foods, Inc.);
- "Esprit" for automobiles and parts (Group Lotus PLC),

all of which are the subject of federal trademark registrations of their third-party owners (see Exhibit 1 for details). Upon information and belief, other third-party users of “Esprit” trademarks for still other types of products include the following:

- “Esprit” for tour planning services (Esprit Travel & Tours);
- “Esprit” for a ski and sports club (Esprit Ski & Sports Club Inc.);
- “Esprit” for pharmaceutical products (Esprit Pharma, Inc.);
- “Esprit Model” for model planes, model helicopters, model robots and related products (Esprit Model);
- “Esprit Design” for interior design services (Esprit Design, Inc.);
- “Esprit Technologies” for vocational career training and technology consulting (Esprit Technologies).

such trademark usage being seen in the documents collected as Exhibit 2.

12. The aforesaid third-party “Esprit” trademarks for varying goods and services have been used for many years and continue to be used uninterrupted by defendant.

13. Plaintiff’s use of its ESPRIT and ESPRIT & Design trademarks does not create a likelihood of confusion with any trademark rights of defendant, and does not infringe defendant’s trademark rights.

14. Despite the many and long uninterrupted third-party uses of “Esprit” trademarks for goods/services completely different than defendants’ goods/services, in recent years defendant has been attempting to assert its trademark rights in various ways against various third parties that have applied for registrations for their “Esprit” marks for a wide variety of products remote from *any* of defendant’s products and services. Examples include the following:

- “Esprit” for medical ventilators (Respironics Georgia, Inc.);
- “Esprit” for paintball guns and accessories (Kingman International Corporation);

- “Esprit” for fishing reels and rods (Pure Fishing, Inc.);
- “Esprity” for interactive and internet-enabled television equipment (Esprity Inc.);
- “Esprity & Design” for interactive and internet-enabled television equipment (Esprity Inc.),

some details of which are seen in the documents collected as Exhibit 3. All of such trademark applications were examined and *allowed* by the United States Patent and Trademark Office (USPTO), thereby showing the USPTO’s expert judgment that the third-parties’ uses of such “Esprit” marks would not create a likelihood of public confusion, including with any of defendant’s trademark rights.

15. Defendant has shown a recent pattern of wrongfully challenging owners of various “Esprit” trademarks, including without limitation those referred to in the above paragraph, and, on information and belief, has caused many to retreat without any administrative or judicial ruling of a likelihood of confusion and despite the absence of a likelihood of confusion.

Plaintiff’s ESPRIT
Trademark Registrations

16. Plaintiff applied for federal trademark registrations on its ESPRIT and ESPRIT & Design trademarks as used for plaintiff’s CAD/CAM-related goods/services with the USPTO on November 27, 2006.

17. Plaintiff’s ESPRIT trademark applications were each examined and *allowed* by the USPTO and subsequently published for opposition, thereby showing the USPTO’s expert judgment that use of plaintiff’s ESPRIT and ESPRIT & Design marks would not create a likelihood of public confusion, including with any of defendant’s “Esprit” rights.

18. On May 29, 2007, plaintiff's ESPRIT & Design trademark was published in the Official Gazette for opposition and, after multiple extensions to defendant on defendant's request, the deadline for defendant to file an Opposition against plaintiff's ESPRIT & Design trademark application was November 26, 2007.

19. On June 5, 2007, plaintiff's ESPRIT trademark was published in the Official Gazette for opposition and, after multiple extensions to defendant on defendant's request, the deadline for defendant to file an Opposition against plaintiff's ESPRIT trademark was December 3, 2007.

20. On November 21, 2007, defendant attempted to file an Opposition ("defendant's first Opposition attempt") against both of plaintiff's ESPRIT trademark applications with the Trademark Trial and Appeal Board ("TTAB"), but failed to serve such Opposition document on plaintiff as required.

21. Late on December 3, 2007, the TTAB rejected defendant's first Opposition attempt based on defendant's failure to serve the document on plaintiff.

22. Given that the deadline for opposing plaintiff's ESPRIT & Design trademark application (November 26, 2007) had passed, defendant lost any right to file an Opposition against plaintiff's ESPRIT & Design trademark application and, on January 15, 2008, plaintiff's United States Trademark Registration No. 3,367,700 for its ESPRIT & Design trademark was issued by the USPTO.

23. On December 4, 2007 the day *after* the December 3, 2007 statutory deadline to file an Opposition against plaintiff's ESPRIT trademark application, defendant filed by United States Mail an Opposition ("defendant's second Opposition attempt") with the TTAB against plaintiff's ESPRIT trademark application.

24. Despite the fact that the envelope containing defendant's second Opposition attempt was marked "December 4, 2007" by the postage meter *of defendant's own counsel*, indicating that the opposition was actually mailed on December 4, 2007, defendant's counsel included with the Opposition document a certification that the document was filed with the PTO (by mail) and served on plaintiff (by mail) on the deadline date of December 3, 2007.

25. On January 22, 2008, the USPTO properly and validly issued to plaintiff United States Registration No. 3,371,523 to plaintiff for its ESPRIT trademark.

26. Nonetheless, the USPTO, by letter dated January 28, 2008, accepted defendant's second Opposition attempt based on defendant's certification as to the mailing date, and further indicated that United States Trademark Registration No. 3,371,523 would be canceled on grounds that the issuance was in error because of defendant's second Opposition attempt, and that the file would be forwarded to the TTAB for possible Opposition proceedings. No formal Opposition action is in progress, nor has any scheduling order been entered in the matter.

27. Defendant's second Opposition attempt asserts 21 of defendant's "Esprit" trademark registrations against plaintiff's ESPRIT trademark. The 21 "Esprit" trademarks which defendant asserts against plaintiff's ESPRIT trademarks are for goods and services which are utterly dissimilar to those offered by plaintiff. For brevity, the list of defendant's 21 asserted "Esprit" registrations, including their description of the goods/services involved, is attached hereto as Exhibit 4.

Defendant's Threats Against Plaintiff's Use of
Plaintiff's ESPRIT and ESPRIT & Design Trademarks

28. On February 4, 2008, counsel for defendant sent a letter to plaintiff's counsel stating, *inter alia*, that defendant's second Opposition attempt was timely filed, and insisting that

plaintiff “refrain” from plaintiff’s long-standing uses of its ESPRIT and ESPRIT & Design trademarks “[i]n order to avoid [plaintiff] having to engage in lengthy and potentially costly proceedings”

29. In at least one subsequent telephone conversation, defendant’s counsel affirmed, *sua sponte*, that defendant is challenging plaintiff’s *right to use* plaintiff’s long-used ESPRIT and ESPRIT & Design trademarks.

30. On March 10, 2008, counsel for defendant sent yet another letter to plaintiff’s counsel once again insisting that plaintiff “refrain” from long-standing uses by plaintiff of its ESPRIT and ESPRIT & Design trademarks.

COUNT I – Seeking Declaratory Judgment

31. Paragraphs 1-30 are realleged and incorporated by reference as if fully set forth herein.

32. Beginning at least as early as the 1990s, defendant has from time to time, through various counsel, confronted plaintiff with respect to plaintiff’s long-standing trademark usage, thus periodically creating legal concerns and costs despite plaintiff’s long-standing trademark use and the absence of any likelihood of confusion.

33. Given the recent threats and continuing threats as laid out in paragraphs 28-30 above, which are directly against plaintiff’s *right to use* its ESPRIT and ESPRIT & Design trademarks in connection with its CAD/CAM-related goods/services and promotion thereof, plaintiff has a reasonable apprehension of being sued by defendant for trademark infringement, thus giving rise to a justiciable controversy between the parties within the meaning of 28 USC §2201.

34. Plaintiff’s long-standing uses of its ESPRIT and ESPRIT & Design trademarks do not create a likelihood of confusion with any trademark rights of defendant, including without

limitation as represented by any of the 21 trademark registrations asserted against plaintiff's ESPRIT trademark in the second Opposition attempt, and do not infringe defendant's trademark rights.

35. Defendant's assertion of the 21 trademark registrations against plaintiff's ESPRIT trademark is a misuse of defendant's trademark registrations.

36. Plaintiff has been damaged and continues to be damaged by defendant's conduct as set forth above.

37. In view of defendant's conduct as set forth above, this is "exceptional case" within the meaning of 15 USC §1117.

Prayer for Relief

WHEREFORE, plaintiff prays that this Court enter judgment in its favor and against defendant as follows:

- A. A declaratory judgment that there is no likelihood of confusion between plaintiff's ESPRIT and ESPRIT & Design trademarks and any of defendant's "Esprit" marks;
- B. A declaratory judgment that plaintiff's continued use of its ESPRIT and ESPRIT & Design trademarks in the manner such marks have been and are being used will not lead to a likelihood of confusion with any of defendant's "Esprit" marks;
- C. A declaration, therefore, that plaintiff has not infringed and does not infringe any of defendant's "Esprit" trademarks;
- D. A declaration that plaintiff's United States Registration Nos. 3,367,700 and 3,371,523 were validly and properly issued;
- E. An order directing defendants to reimburse plaintiff for plaintiff's attorneys' fees and costs incurred in this matter; and

F. Such other and further relief as this Court deems just and proper.

Jury Demand

Plaintiff hereby demands trial by jury on all issues triable to a jury.

Dated this 2nd day of April, 2008.

Respectfully submitted,

JANSSON SHUPE & MUNGER LTD.

By s/Peter N. Jansson
Peter N. Jansson (IL Bar #1326074)

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JANSSON SHUPE & MUNGER LTD.
207 East Westminster
Lake Forest, IL 60045
Tel: 262/632-6900
Fax: 262/632-2257

Exhibit 1

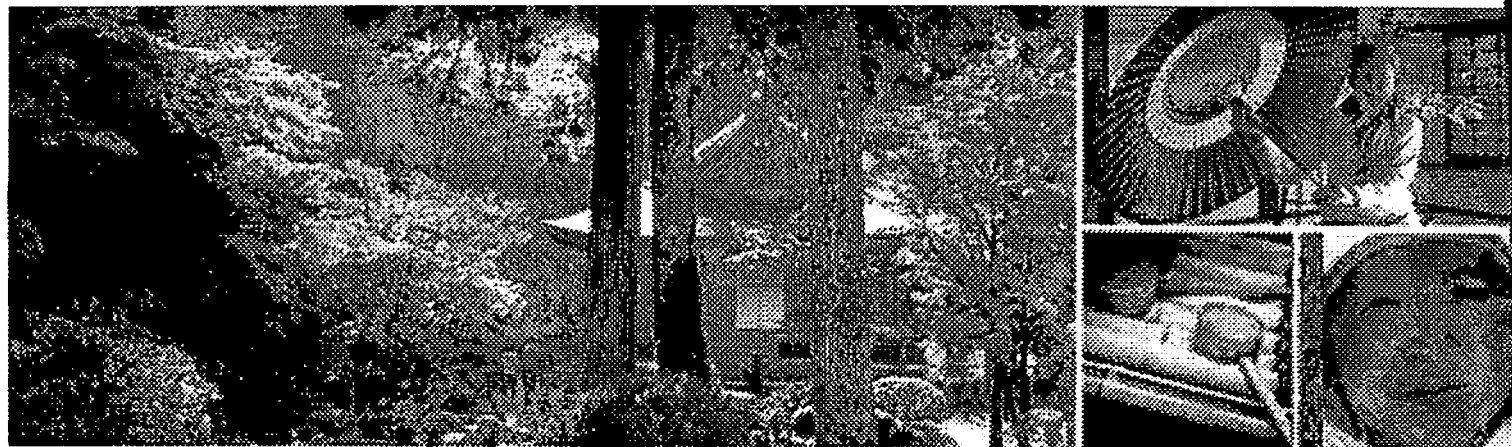
EXHIBIT 1 - USES BY THIRD PARTIES HOLDING FEDERAL REGISTRATIONS

Mark	Goods & Services	Owner	1st Use or Priority Date	Regis. No.
ESPRIT	Glass fiber ceiling panels	Owens-Corning Fiberglas Corporation	05/06/1976	1,068,1325
ESPRIT	Prostheses for hands, legs, arms and feet; orthoses for hands, legs, arms and feet, trunk and neck; artificial limbs; artificial knees, feet and ankles; artificial skin covering used to cover prosthetic devices; parts and fitting for the aforesaid goods	Chas. A. Blatchford & Sons Limited	02/22/2006	3,324,847
ESPRIT	Woodwind instruments; namely, clarinets	Conn-Selmer, Inc.	07/15/1991	1,753,209
ESPRIT	Medical devices, namely, sub-acute ventilators	RIC Investments LLC	06/25/1999	2,336,538
ESPRIT	Control panel for electronic security alarm systems, key pads, therefor, and accessories therefor, namely, adapter used to connect modem to a computer, output module, test module, battery, panic button, and zone interface module.	Paradox Security Systems Ltd.	12/01/1993	2,267,961
ESPRIT	Permanent camera mounts for mounting video surveillance cameras	Pelco Sales, Inc.	02/25/1999	2,457,928
ESPRIT REALTY	Real estate brokerage	Adrian McMillian	02/13/2006	3,189,401
ESPRIT MIAMI	Fresh cut flowers	Christine Martindale	09/03/1992	1,803,875
ESPRIT HR	Textile goods for surgical, medical and veterinary products, namely, incontinence sheets and hospital mattress covers	British Millerrain Company Limited	11/11/2002	2,900,198
ESPRIT DE PARIS	Food products, namely mustard	Schreiber Foods International, Inc.	12/30/1998	2,335,438
ESPRIT	Automobiles and structural parts therefor	Group Lotus PLC Co.	01/00/1977	1,489,237

Exhibit 2

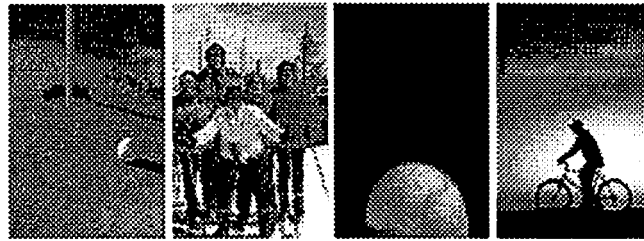
Esprit

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What is Esprit "The Ultimate" Ski and Sports Club?

A little history.

In 1978 a group of friends met and decided they wanted to be on the 'cutting edge' of skiing and Esprit Ski Club was formed. In March of 1979, Esprit members traveled to their first NBS (National Brotherhood of Skiers) Summit in Sun Valley, Idaho with approximately 200 other NBS skiers. It was during that year Esprit joined the NBS and incorporated as a non-profit organization. To date, an estimated 4,000 plus African-American skiers attend the annual Summit.

In 1993, Esprit changed its name to Esprit Ski & Sports Club, Inc. The goal of Esprit was and remains, to introduce minorities to the sport of skiing. In 2000 the name was changed to Esprit The Ultimate Ski & Sports Club.

News / Information

* Mouse over text to freeze message

Esprit functions under the umbrellas of the National Brotherhood of Skiers (NBS), as well as the Cleveland Metro Ski Council. The goals of the NBS include the fundin, development and support of an African-American youth to the competitive level of the Olympic Ski Team.

Esprit has been instrumental in providing funding for ski lessons, as well as local and international trips for a number of African-American youth. Esprit's active involvement in skiing through its members has produced National Ski Patrol members, PSIA Certified Ski Instructors as well as many, many fun-loving African-Americans who just love the sport!



NBS Summit 2002/03 Penticton-Blackcomb, British Columbia Canada

Esprit is always on the move! As a result of increased membership and a peaked interest in summer sports, Esprit decided to meet the needs of it members. Our activities include the Annual Racquetball and Splash parties, both held during off-ski season. We also enjoy camping, bike riding, golfing, roller-skating, tennis, white water rafting, traveling, just to name a few.

Our members come from all over the United States. Therefore, we encourage all to take advantage of the wonderful experience of skiing and invite you to join Esprit "The Ultimate" Ski and Sports Club and enjoy winter to its fullest!



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esprit (é-sprè) n. | from the Latin spiritus, spirit |
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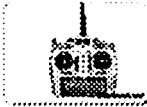













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I am an independent interior designer. My name is Teri Barnett and I do business under the name of Esprit Design, Inc. I've been providing award winning commercial interior design services to the Indianapolis, Indiana community for over twenty five years.

Developers and furniture dealers often throw in design services as part of their overall package. Thus, I am often asked, "Why incur additional costs to a project when "design" can be had for free?"

I answer this question with a question of my own, "Is it really free? Are you sure you're getting the best products and services to maximize the efficiency and profitability of your company? Or are they selling you products and services that maximize profitability of their company?"

As an independent designer, I'm not affiliated with a furniture dealer or building developer. There are no "conflicts of interest" you need to worry about and I receive no commissions for any products or services. All of my professional knowledge, experience, and industry contacts are directed exclusively to represent your company's best interest.

Many people think an Interior Designer is simply a decorator that selects wall coverings, fabrics and furniture. But in fact, nothing could be further from the truth. A professional interior designer is a complete project manager. In these competitive times, it's increasingly more difficult, and inefficient, for business owners or corporate professional



Teri Barnett

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to devote the time necessary to effectively manage a project. We take that burden from you and act as your advocate and representative to the developer, contractor, and furniture dealership.

Any developer or furniture dealer can throw out a quick floorplan. On the other hand, as a professional interior designer, my emphasis is always on functionality and improved work processes to maximize productivity and profits of your company. The space must work from a functional standpoint. It must allow staff fluid movement from one task to another, ease of access to shared work spaces, and ergonomically designed work settings. My objective is to ensure a successful build-out, remodel, furniture installation, or move coordination inside your space as cost effectively and as efficiently as possible.

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- I help you determine a budget for build out of the space.
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- I help you determine the furniture requirements that will most efficiently meet your business' goals and objectives.
- I help you determine the type and grade of furnishings, finishes, and floor coverings.
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Teri Barnett
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Exhibit 3

**EXHIBIT 3 - SOME THIRD-PARTY TRADEMARKS AGAINST
WHICH DEFENDANT HAS ASSERTED ITS “ESPRIT” REGISTRATIONS**

Mark	Goods & Services	Owner
ESPRIT	Medical devices, namely, sub-acute ventilators.	RIC Investments LLC
ESPRIT	Paintball guns and accessories therefor in the nature of barrels, grip frames, frame covers, grips, expansion chambers, sight rails, trigger assemblies, barrel plugs and trubulence bolts.	Kingman International Corporation
ESPRIT	Fishing reels, fishing rods, and a combination of a fishing rod and a fishing reel.	Pure Fishing, Inc.
ESPRITV	Interactive television equipment and internet-enabled television equipment.	Esprtv, Inc.
ESPRITV & Design	Interactive television equipment and internet-enabled television equipment.	Esprtv, Inc.

Exhibit 4

EXHIBIT 4 - DEFENDANT'S ASSERTED "ESPRIT" REGISTRATIONS

<u>Trademark</u>	<u>Registration No.</u>	<u>Goods/Services</u>
ESPRIT	0,765,974	Women's shoes
ESPRIT	0,817,950	Perfume and toilet water
ESPRIT	1,056,960	Watches
ESPRIT	1,080,349	Luggage
ESPRIT & Design	1,287,788	Sunglasses
ESPRIT	1,340,608	Jewelry
ESPRIT	1,342,393	Sunglasses
ESPRIT	1,400,380	Towels and Bathrobes
ESPRIT & Design	1,401,275	Women's wearing apparel, namely, blouses, knit tops, halters, t-shirts, smock tops, sweater, jackets, pants and skirts; and men's wearing apparel, namely, t-shirts and pants.
ESPRIT	1,406,681	General merchandise catalogs
ESPRIT	1,480,858	Belts, gloves, mufflers, scarves, hats, socks, tights, leggings, sweatshirts, sweat pants, vests and coats
ESPRIT & Design	1,481,649	Belts, gloves, mufflers, scarves, hats, socks, tights, leggings, sweatshirts, sweat pants, vests and coats
ESPRIT & Design	1,485,327	Shoes, slippers, boots, sneakers, athletic shoes, hosiery, socks, tights, leggings, leotards, gloves, hats, scarves, belts, vests, dresses, coats mufflers, stockings, pajamas, panties, underwear, headbands, shorts, jogging suits, sweatshirts, sweat pants, ski jackets, ski pants, raincoats, robes, nightgowns and swimwear

<u>Trademark</u>	<u>Registration No.</u>	<u>Goods/Services</u>
ESPRIT	1,532,973	Note paper, notebooks, address books, envelopes, pens, pencils, pen and pencil holders, paper bags, stationery-type portfolios, clipboards, calendars, posters, cardboard boxes, newspapers, magazines and books pertaining to fashion, lifestyle, architecture, interior design, art, personality, fitness, health and food
ESPRIT	1,559,014	Purses and handbags
ESPRIT	1,709,010	Retail store services for clothing, clothing accessories, bedding, eyewear, jewelry, watches, books, stationer items, bags, shoes and socks
ESPRIT & Design	1,673,462	Purses, handbags, tote bags, backpacks, wallets, messenger bags, key cases, hip packs, book bags, cosmetic cases sold empty, and carry-on bags
ESPRIT & Design	1,898,850	Watches
ESPRIT & Design	3,237,882	Jewelry and watches
ESPRIT & Design	3,240,170	Men's apparel, namely, shirts, ties, pants, sweaters, jackets, coats, suits, shorts, t-shirts, sweaters, sweatshirts, sweat pants, undershirts, underwear, belts, caps, hats, vests, scarves, gloves; men's footwear, namely, shoes, slippers, and athletic shoes
ESPRIT	3,242,759	Men's apparel, namely, shirts, ties, pants, sweaters, jackets, coats, suits, shorts, t-shirts, sweaters, sweatshirts, sweat pants, undershirts, underwear, belts, caps, hats, vests, scarves, gloves; men's footwear, namely, shoes, slippers, and athletic shoes